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ABSTRACT

Guidelines issued separately by the University of Wisconsin-Madison (UW) and the American Library Association (ALA) concerning the fair use of copyrighted materials are presented. In addition, a UW memo is presented that covers background information on the Copyright Law and multiple copy reproduction of copyrighted materials for classroom use. The guidelines address the following concerns: copying that is completely unrestricted, copying that is permitted, copying for which teachers should obtain permission, publishers' guidelines for making multiple copies for classroom use, infringement, and contacting the legal staff for assistance. The ALA's model policy concerns college and university photocopying for classroom, research, and library reserve use. Issues pertain to the following: whether the materials are used repeatedly, how many copies are made for each student, whether the copyright notice is included on each copy distributed; whether students are assessed a fee beyond the reproduction cost; and whether the portion of a longer work that is copied is selective and sparing in comparison to the whole of the work. The UW memo suggests that the staff will likely be in compliance with the copyright law if they follow carefully the ALA guidelines. (SW)

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ED238384

GUIDELINES FOR FAIR USE OF COPYRIGHTED MATERIALS November 1983

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Guidelines for Fair Use of Copyrighted Materials

New York University reached an out-of-court settlement in May with nine publishers who had charged NYU, and selected faculty members, with violating copyright law. The settlement called for the university to adopt campus-wide guidelines on photocopying instructional materials. The guidelines duplicate almost verbatim the copying standards set forth in 1976 —when the Copyright Act was last revised—by a group of educators and publishers.

In June, the Association of American Publishers (AAP) mailed the NYU guidelines to colleges and universities, suggesting they be adopted as campus policy. Other organizations are involved in copyright issues, however, and other acceptable policies exist.

One of the latter, reprinted here, is from the University of Wisconsin—Madison. In effect since 1978, the university's guidelines cover unrestricted copying, "fair use" duplication of classroom materials, and photocopying for which permission is required. Since institutions have already received the NYU guidelines, endorsed and supported by the publishing industry, the Wisconsin policy and accompanying memo are reprinted for purposes of comparison. (Institutions wanting to reprint this policy should contact Gail S. Kalson, attorney for UW-Madison, 361 Bascom Hall, 500 Lincoln Drive, Madison, WI 53706.)

Also reprinted are guidelines prepared by the American Library Association (ALA), which offer a broader interpretation of the "fair use" doctrine than the NYU guidelines. The guidelines are reprinted with the permission of the ALA.

Finally, two papers from the Association of Research Libraries (ARL), although not reprinted here, provide valuable information on copyright issues. "Reproduction of Copyrighted Materials for Classroom Use; a Briefing Paper for Teaching Faculty and Administrators" and "Current Issues in Library Photocopying and Copyright; a Briefing Paper for Librarians and Archivists" are available from NACUBO. Please send a stamped self-addressed envelope to the NACUBO Federal Relations Department.

NACUBO encourages colleges and universities to develop and enforce photocopying guidelines. The NYU case makes it clear that publishers mean to examine the higher education community for copyright abuses. But it is important to note that more than one legitimate copyright policy exists, and institutions need not feel that they must conform to the AAP guidelines; they may rely, in whole or in part, on other policies.

UW-Madison Memo on Guidelines for Multiple Copy Reproduction of Copyrighted Materials for Classroom Use

Recent litigation has focused on the application of the Fair Use provisions in the copyright law to reproduction of copyrighted materials for classroom use. This memo is being sent so that you have available and can make sure all teaching staff are informed about the provisions of the copyright law as they pertain to classroom copying of copyrighted materials.

I. The Copyright Law. Under the copyright law, the copyright owner has the exclusive right to reproduce and distribute the work. The "fair use exception" permits copying without the copyright owner's permission for purposes such as criticism, comment, teaching, scholarship, or research.

In determining whether the use is a "fair use" the law requires consideration of the following factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work. (17 U.S.C. Sec. 107)

The determination of fair use is made on a case-by-case basis. It is important to note that the law applies even to material distributed free to the students. It holds the course instructor responsible if the copying is done at his or her request, even if it is an outside copy center that reproduces and distributes the work. The university's own policy is that teaching staff are expected to secure permission from the copyright owners unless the intended use clearly is permissible under the "fair use" exception.

II. Permissible Copying. The American Library Association (ALA) has developed model guidelines for classroom, research and library use of copyrighted materials. We believe they provide a realistic approach to the university's need to disseminate meaningful and current information in its instructional program. These ALA guidelines are attached; they also contain a sample letter for requesting permission to copy and a summary of infringement remedies available to the copyright owner.

As yet, no court cases have interpreted the Fair Use exception in the university context. Despite the availability of the ALA guidelines, no automatic formula determines whether a use is a fair use. However, we believe you would be in compliance with the law if: (1) the materials are not used repeatedly; that is, you have not used them in preceding classes and you do not intend to use them in subsequent classes; (2) no more than one copy is made for each student; (3) the notice of copyright is included on each copy distributed; (4) the students are not assessed a fee beyond the actual cost of reproduction; and (5) in the case of longer materials and books, the portion copied is selective and sparing in comparison to the whole of the work.

The right to make multiple copies is weakened if there is any reason to believe that the copying will directly affect the potential market for the work or if copying was done without permission when the decision to copy was made with sufficient lead time to request permission. This does not mean however that an instructor has free license to copy what he or she wishes if the decision is made the week before classes.

III. Publisher Recognized Guidelines. A congressionally approved agreement between representatives of publishers' associations and educational institutions accepts the points listed above, but also urges use of a quantitative standard. It argues that "fair use" should not permit the copying of any poem longer than 250 words or the copying, in full, of any prose work longer than 2,500 words (although 10 percent of any longer prose work could be copied up to a maximum of 1,000 words). The agreement would also insist that not more than one photo or diagram should be copied from any single book or periodical, that the decision to copy be a spontaneous one, and that no anthologies or collective works be created by means of copying.

A spontaneous decision would be made, for example, where an article, etc., has just appeared in a journal and it related to subject matter being covered in a course. The publishers [used] these standards in arguing their . . . case against New York University and several of its professors. Publishers have raised particular concern about the creation of anthologies that use copyrighted material without permission in order to produce a volume used as a textbook or class reader. One court has found the agreement "instructive" in a case dealing with the distribution of copies of a copyrighted work in a secondary school classroom.

IV. Recommended Procedures for Multiple Copying for Classroom Use. In the absence of any satisfactory definition of "fair use" by court test or law, individual judgment must be exercised. On balance we believe the American Library Association guidelines provide a more realistic approach in the university context [than the agreement in III above].

The ALA advises faculty to be "selective and sparing" in copying, but to reject for university situations the arbitrary limits proposed by the publishers. In our view, UW-Madison staff will be complying with the law if they follow carefully the ALA guidelines.

UW-Madison Guidelines for Photocopying for Teaching and Research

A. Introduction

A new, complex U. S. copyright law went into effect on January 1, 1978. One portion of the new law authorizes teachers to reproduce some copyrighted works without paying royalties or securing permission. However, that part is expressed in such general terms that more explicit guidance is needed. These guidelines are intended to afford that assistance.

B. Copying That Is Completely Unrestricted

1. Published Works Which Were Never Copyrighted. Anyone may reproduce without restriction works that were never copyrighted.

To determine whether an item has been copyrighted, look at the front pages of the book or periodical for a copyright notice. It consists of the copyright symbol (a letter "c" in a circle, the word "Copyright," or the abbreviation "Copr."), plus the year of first publication and the name of the owner of the copyright. Writings published prior to January 1, 1978 without copyright notices are not protected. "Notice" requirements for works published after that date have been relaxed somewhat with respect to both the position of notices and inadvertent omission of them, so there may be limited protection for some works on which notices do not appear. However, in such instances copiers will not be liable for infringement who did not learn in some other way, prior to copying, that the works were actually copyrighted despite the lack of notices on them.

2. Published Works Whose Copyrights Have Expired. Anyone may reproduce without constraint published works whose copyrights have expired.

All copyrights dated earlier than 1908 have expired. Copyrights dated 1908 or later may have expired because the initial period of copyright protection is for 28 years. We recommend that copiers either assume the protection is still in effect for copyrights dated in 1908 or later, or ask the owners of them (or the U.S. Copyright Office) whether they are still subject to copyright protection. Usuallly publishers are either the owners or know the owners' locations. If not, owners can be located through the U.S. Copyright Office in Washington, D.C.

3. U.S. Government Publications. U.S. Government publications may be copied freely because they are not copyrightable. This classification consists of documents prepared by an officer or employee of the U.S. Government as part of that person's official duties. It does not extend to documents published by others with the support of U.S. Government grants or contracts. Such items may or may not be copyrighted and teachers should look at the front pages to see if they bear a copyright notice.

C. Copying That Is Permitted

Teachers may reproduce copyrighted works for classroom use and for research without securing permission and without paying royalties when the circumstances amount to what the law calls "fair use." It is generally fair use for teachers to copy supplementary items for such purposes as filling in missing information or for bringing materials up to date; but fair use is a multi-faceted concept. Courts have not yet interpreted the law, and there is a lively dispute as to the extent of permissible copying, particularly for classroom use. The spirit and letter of these guidelines should be observed.

1. Single Copies. For teaching, including preparation, and for scholarly research, a teacher may make, or have made, a single copy of:

a. a chapter from a book;

b. an article from a journal, periodical or newspaper;

c. a short story, essay or poem;

d. a diagram or picture in any of those works.

2. Multiple Copies. For one-time distribution in class to students, a teacher may make, or have made, multiple copies if he or she:

a. makes no more than one for each student; and

b. includes the notice of copyright (writes it on the first sheet or copies the page on which it appears); and

c. is selective and sparing in choosing poetry, prose and illustrations; and

d. makes no charge to the student beyond the actual cost of the photocopying.

The right to make multiple copies is strengthened if the copying will not have a significant effect upon the potential market for the work or if there is insufficient time to seek permission from the owner of the copyright.

D. Copying for Which Teachers Should Obtain Permission

1. Repetitive Copying. The "fair use" justification is weakened in the case of photocopying on a repetitive basis for continued use in successive terms.

2. Copying for Profit. Fair use extends only to nonprofit copying. Teachers should not charge students more than the actual cost of photocopying, and should not make copies for students who are not in their own classes, without obtaining permission. Publishers have recognized that fair use extends to classroom copies made and distributed by a commercial copy center.

3. Unpublished Works. One should obtain permission from owners of unpublished works in order to copy from them. The law gives automatic copyright protection to unpublished works from the time they are created.

4. Consumable Works. Teachers need to secure permission before making multiple copies of copyrighted works that are intended to be consumed in classroom activities such as workbooks, exercises, and standardized tests and their answers.

5. Copying According to an Overall Plan. Teachers may make fair use of copyrighted works if they photocopy on their own initiative. In most instances it is not fair use to copy according to a plan designed by supervisors, which usually means administrators in the university context.

E. Publishers' Guidelines—Multiple Copies for Classroom Use

The Association of American Publishers (AAP) asserts that the fair use exception is narrower than the guidelines discussed above. Several copyright infringement suits have been settled based on guidelines developed by the Ad Hoc Committee on Copyright Law Revision. The AAP and others have sued several professors and a university for copyright infringement based on these guidelines. This case was settled with the university agreeing to follow the guidelines below, unless the university's attorney advised that the proposed copying constituted fair use. We believe the Ad Hoc Committee guidelines provide for only the *minimum* level of copying permitted by the law and that the fair use exception permits copying as described in (C) above. We recommend following the American Library Association guidelines. . . . The Ad Hoc Committee guidelines are as follows:

Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

A. The copying meets the tests of brevity and spontaneity as defined below; *and,*

B. Meets the cumulative effect test as defined below; *and,*

C. Each copy includes a notice of copyright.

Definitions

Brevity

(*i*) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(*ii*) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(*iii*) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(*iv*) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(*i*) The copying is at the insiance and inspiration of the individual teacher, and

(*ii*) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(*i*) The copying of the material is for only one course in the school in which the copies are made.

(*ii*) Not more than one short poem, article, story, essay, or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(*iii*) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

Prohibitions

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations, or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets, and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints, or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of photocopying.

Agreed MARCH 19, 1976
Ad Hoc Committee on Copyright Law Revision:
By SHELDON ELLIOTT STEINBACH.
Author-Publisher Group:
Authors League of America:
By IRWIN KARP, *Counsel.*
Association of American Publishers, Inc.:
By ALEXANDER C. HOFFMAN, *Chairman, Copyright Committee.*

F. How to Obtain Permission

(We are indebted to the Association of American Publishers for this material on how to obtain permission which is quoted from its booklet, Explaining the New Copyright Law.)

. . . One of the most frequent reasons cited by permissions departments for delays in answering requests . . . is incomplete or inaccurate information contained in requests. A survey of permissions . . . conducted by the AAP determined that the following facts are necessary in order to authorize duplication of copyrighted materials.

1. Title, author and/or editor, and edition of materials to be duplicated
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material
3. Number of copies to be made
4. Use to be made of duplicated materials (and duration)
5. Form of distribution (classroom, newsletter, etc.)
6. Whether or not the material is to be sold
7. Type of reprint (ditto, photography, offset, typeset). . . .

"The request should be sent, together with a self-addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be readily obtained in a publication entitled *The Literary Marketplace*, published by the R. R. Bowker Company and available in all libraries.

"Because each request must be checked closely by the publisher, it is advisable to allow enough lead time to obtain the permission before the materials are needed. Granting of a permission to duplicate is not simply a 'yes' or 'no' matter. (Although many publishers have a minimum or no-charge policy for such uses by non-commercial organizations, they must first review the status of the copyright to see if the power to grant duplication rights of this nature is within their scope or province.) Each such request requires a careful checking of the status of the copyright, determination of exact materials to be duplicated (which sometimes involves ordering a copy of the material from a warehouse), and assignment of author's royalties if fees are involved. Some helpful hints from those involved daily in the processing of permission include:

"1. Request all permissions for a specific project at the same time

2. Don't ask for a blanket permission—it cannot, in most cases, be granted

3. Send a photocopy of the copyright page and the page or pages on which permission is requested

4. Make sure to include a return address in your request."

[See the sample letter requesting permission to copy on page 21.]

G. Infringement

Because of the vagueness in the "fair use" provisions in the new act, it is possible that teachers may innocently infringe upon copyrights through photocopying.

Owners of copyrights can attempt to halt infringement by suing for injunctions, and can seek to recoup their actual market losses by claiming money damages. Where there are only nominal monetary losses, owners can instead of seeking their actual damages, claim "statutory" damages up to $10,000 (or up to $50,000 if the infringement was "willful").

While photocopying by a teacher may result in an infringement, it should not produce an actual monetary loss of consequence if the teacher attempts to limit his or her copying to fair use. Good faith exercise of that right precludes copying in quantities that are likely to be large enough to seriously affect the potential market for a work. However, a court's determination that an infringement has occurred, will, even in the absence of actual or statutory damages, probably result in an order that the offending copying should cease. Such an order is called an injunction.

Even if teachers' copying is held to infringe, the new act exempts them from "statutory" damages and limits their exposure to actual damages, if they believed their copying was fair use and they had reasonable grounds for that belief. Adhering to the guidelines in (C) above should afford reasonable grounds for believing one is engaging in fair use; and, as noted above, a good faith attempt at fair use is unlikely to result in significant actual damages.

[A paragraph appears here on Wisconsin law vis-a-vis defending state employees in an infringement suit.]

H. Contact the Legal Staff for Assistance

As you can see from these guidelines, the new Copyright Law is an extremely complex document—one which will be subject to a wide variety of interpretations. Because the statute has a significant effect upon the university's teaching, research, and service programs, it is important that the campus understand the letter and spirit of the law. If you have further questions or would like advice on specific aspects of the law as they may apply to your area of responsibility, please call the [institution's counsel].

ALA Model Policy Concerning College and University Photocopying for Classroom, Research, and Library Reserve Use

This model policy, another in a series of copyright advisory documents developed by the American Library Association (ALA), is intended for the guidance and use of academic librarians, faculty, administrators, and legal counsel in response to implementation of the rights and responsibilities provisions of Public Law 94-553, *General Revision of the Copyright Law*, which took effect on January 1, 1978.

Prepared by ALA Legal Counsel Mary Hutchings of the law firm Sidley & Austin, with advice and assistance from the Copyright Subcommittee (ad hoc) of ALA's Legislation Committee, Association of College and Research Libraries (ACRL) Copyright Committee, Association of Research Libraries (ARL) and other academic librarians and copyright attorneys, the model policy outlines "fair use" rights in the academic environment for classroom teaching, research activities, and library services. Please note that it does not address other library photocopying which may be permitted under other sections of the Copyright Law, e.g., §108 (Reproduction by Libraries and Archives).

Too often, members of the academic community have been reluctant or hesitant to exercise their rights of fair use under the law for fear of courting an infringement suit. It is important to understand that in U.S. law, copyright is a limited statutory monopoly and the public's *right* to use materials must be protected. Safeguards have been written into the legislative history accompanying the new copyright law protecting librarians, teachers, re-

searchers, and scholars and guaranteeing their rights of access to information as they carry out their responsibilities for educating or conducting research. It is, therefore, important to heed the advice of a former U.S. Register of Copyrights:

"If you don't *use* fair use, you will *lose* it!"

I. The Copyright Act and Photocopying

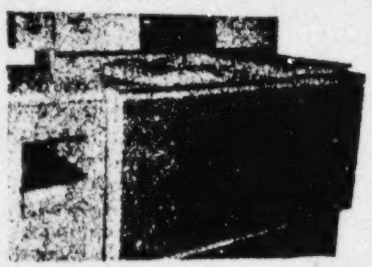
From time to time, the faculty and staff of this university [college] may use photocopied materials to supplement research and teaching. In many cases, photocopying can facilitate the university's [college's] mission; that is, the development and transmission of information. However, the photocopying of copyrighted materials is a right granted under the copyright law's doctrine of *"fair use"* which must not be abused. This report will explain the university's [college's] policy concerning the photocopying of copyrighted materials by faculty and library staff. Please note that this policy does not address other library photocopying which may be permitted under other sections of the copyright law, e.g., 17 U.S.C. §108.

Copyright is a constitutionally conceived property right which is designed to promote the progress of science and the useful arts by securing for an author the benefits of his or her original work of authorship for a limited time. (U.S. Constitution, Art. I, Sec. 8.) The copyright statute, 17 U.S.C. § 101 *et seq.*, implements this policy by balancing the author's interest against the public interest in the dissemination of information affecting areas of universal concern, such as art, science, history, and business. The grand design of this delicate balance is to foster the creation and dissemination of intellectual works for the general public.

The Copyright Act defines the rights of a copyright holder and how they may be enforced against an infringer. Included within the Copyright Act is the "fair use" doctrine which allows, under certain conditions, the copying of copyrighted material. While the act lists general factors under the heading of "fair use" it provides little in the way of specific directions for what constitutes fair use. The law states:

> *17 U.S.C. §107. Limitations on exclusive rights: Fair use*
>
> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, *including such use by reproduction in copies* or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.* In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work. (Emphasis added.)

The purpose of this report is to provide you, the faculty and staff of this university [college], with an explanation of when the photocopying of copyrighted material in our opinion is permitted under the fair use doctrine.



Where possible, common examples of research, classroom, and library reserve photocopying have been included to illustrate what we believe to be the reach and limits of fair use.

Please note that the copyright law applies to all forms of photocopying, whether it is undertaken at a commercial copying center, at the university's [college's] central or departmental copying facilities or at a self-service machine. While you are free to use the services of a commercial establishment, you should be prepared to provide documentation of permission from the publisher (if such permission is necessary under this policy), since many commercial copiers will require such proof.

We hope this report will give you an appreciation of the factors which weigh in favor of fair use and those factors which weigh against fair use, but faculty members must determine for themselves which works will be photocopied. This university [college] does not condone a policy of photocopying instead of purchasing copyrighted works where such photocopying would constitute an infringement under the copyright law, but it does encourage faculty members to exercise good judgment in serving the best interests of students in an efficient manner. This university [college] and its faculty and staff will make a conscientious effort to comply with these guidelines.

Instructions for securing permission to photocopy copyrighted works when such copying is beyond the limits of fair use appear at the end of this report. It is the policy of this university [college] that the user (faculty, staff, or librarian) secure such permission whenever it is legally necessary.

II. Unrestricted Photocopying

A. Uncopyrighted Published Works. Writings published before January 1, 1978 which have never been copyrighted may be photocopied without restriction. Copies of works protected by copyright must bear a copyright notice, which consists of the letter "c" in a circle, or the word "Copyright," or the abbreviation "Copr.," plus the year of first publication, plus the name of the copyright owner. (17 U.S.C. §401.) As to works published before January 1, 1978, in the case of a book, the notice must be placed on the title page or the reverse side of the title page. In the case of a periodical the notice must be placed either on the title page, the first page of text, or in the masthead. A pre-1978 failure to comply with the notice requirements resulted in the work being injected into the public domain, i.e., unprotected. Copyright notice requirements have been relaxed since 1978, so that the absence of notice on copies of a work published after January 1, 1978 does not necessarily mean the work is in the public domain. (17 U.S.C. §405 (a) and (c).) However, you will not be liable for damages for copyright infringement of works published after that date, if, after normal inspection, you photocopy a work on which you cannot find a copyright symbol and you have not received actual notice of the fact the work is copyrighted. (17 U.S.C. §405(b).) However, a copyright owner who found out about your photocopying would have the right to prevent further distribution of the copies if in fact the work were copyrighted and the copies are infringing. (17 U.S.C. §405(b).)

B. Published Works With Expired Copyrights. Writings with expired copyrights may be photocopied without re-

striction All copyrights prior to 1906 have expired. (17 U.S.C. §304(b).) Copyrights granted after 1906 may have been renewed; however the writing will probably not contain notice of the renewal. Therefore, it should be assumed all writings dated 1906 or later are covered by a valid copyright, unless information to the contrary is obtained from the owner or the U.S. Copyright Office (see Copyright Office Circular 15t).

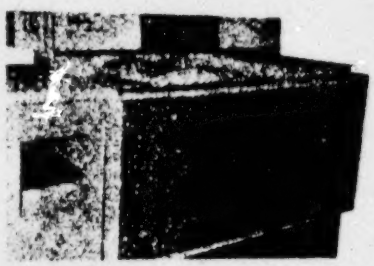
Copyright Office Circular R22 explains how to investigate the copyright status of a work. One way is to use the *Catalog of Copyright Entries* published by the Copyright Office and available in [the university library] many libraries. Alternatively you may request the Copyright Office to conduct a search of its registration and/or assignment records. The office charges an hourly fee for this service. You will need to submit as much information as you have concerning the work in which you are interested, such as the title, author, approximate date of publication, the type of work or any available copyright data. The Copyright Office does caution that its searches are not conclusive; for instance, if a work obtained copyright less than 28 years ago, it may be fully protected although there has been no registration or deposit.

C. Unpublished Works. Unpublished works, such as theses and dissertations, may be protected by copyright. If such a work was created before January 1, 1978 and has not been copyrighted or published without copyright notice, the work is protected under the new act for the life of the author plus fifty years (17 U.S.C. §303), but in no case earlier than December 31, 2002. If such a work is published on or before that date, the copyright will not expire before December 31, 2027. Works created after January 1, 1978 and not published enjoy copyright protection for the life of the author plus fifty years. (17 U.S.C. §302.)

D. U. S. Government Publications. All U.S. government publications with the possible exception of some National Technical Information Service Publications less than five years old may be photocopied without restrictions except to the extent they contain copyrighted materials from other sources. (17 U.S.C. §105.) U.S. Government publications are documents prepared by an official or employee of the government in an official capacity. (17 U.S.C. §101.) Government publications include the opinions of courts in legal cases, congressional reports on proposed bills, testimony offered at congressional hearings, and the works of government employees in their official capacities. Works prepared by outside authors on contract to the government may or may not be protected by copyright, depending on the specifics of the contract. In the absence of copyright notice on such works, it would be reasonable to assume they are government works in the public domain. It should be noted that state government works may be protected by copyright. (*See*, 17 U.S.C. §105.) However, the opinions of state courts are not protected.

III. Permissible Photocopying of Copyrighted Works

The Copyright Act allows anyone to photocopy copyrighted works without securing permission from the copyright owner when the photocopying amounts to a "fair use" of the material. (17 U.S.C. §107.) The guidelines in this report discuss the boundaries for fair use of photocopied material used in research or the classroom or in a library reserve operation. Fair use cannot always be expressed in numbers—either the number of pages copied or



the number of copies distributed. Therefore, you should weigh the various factors listed in the act and judge whether the intended use of photocopied, copyrighted material is within the spirit of the fair use doctrine. Any serious questions concerning whether a particular photocopying constitutes fair use should be directed to university [college] counsel.

A. Research Uses. At the very least, instructors may make a single copy of any of the following for scholarly research or use in teaching or preparing to teach a class:

1. a chapter from a book;

2. an article from a periodical or newspaper;

3. a short story, short essay, or short poem, whether or not from a collective work;

4. a chart, diagram, graph, drawing, cartoon, or picture from a book, periodical, or newspaper.

These examples reflect the most conservative guidelines for fair use. They do not represent inviolate ceilings for the amount of copyrighted material which can be photocopied within the boundaries of fair use. When exceeding these minimum levels, however, you again should consider the four factors listed in Section 107 of the Copyright Act to make sure that any additional photocopying is justified. The following demonstrate situations where increased levels of photocopying would continue to remain within the ambit of fair use:

1. the inability to obtain another copy of the work because it is not available from another library or source or cannot be obtained within your time constraints;

2. the intention to photocopy the material only once and not to distribute the material to others;

3. the ability to keep the amount of material photocopied within a reasonable proportion to the entire work (the larger the work, the greater amount of material which may be photocopied).

Most single-copy photocopying for your personal use in research—even when it involves a substantial portion of a work—may well constitute fair use.

B. Classroom Uses. Primary and secondary school educators have, with publishers, developed the following guidelines, which allow a teacher to distribute photocopied material to students in a class without the publisher's prior permission, under the following conditions:

1. the distribution of the same photocopied material does not occur every semester;

2. only one copy is distributed for each student, which copy must become the student's property;

3. the material includes a copyright notice on the first page of the portion of material photocopied;

4. the students are not assessed any fee beyond the actual cost of the photocopying.

In addition, the educators agreed that the amount of material distributed should not exceed certain brevity standards. Under those guidelines, a prose work may be reproduced in its entirety if it is less than 2,500 words in length. If the work exceeds such length, the excerpt reproduced may not exceed 1,000 words, or 10 percent of the work, whichever is less. In the case of

poetry, 250 words is the maximum permitted.

These minimum standards normally would not be realistic in the university setting. Faculty members needing to exceed these limits for college education should not feel hampered by these guidelines, although they should attempt a "selective and sparing" use of photocopied, copyrighted material.

The photocopying practices of an instructor should not have a significant detrimental impact on the market for the copyrighted work. (17 U.S.C. §107 (4).) To guard against this effect, you usually should restrict use of an item of photocopied material to one course and you should not repeatedly photocopy excerpts from one periodical or author without the permission of the copyright owner.

C. Library Reserve Uses. At the request of a faculty member, a library may photocopy and place on reserve excerpts from copyrighted works in its collection in accordance with guidelines similar to those governing formal classroom distribution for face-to-face teaching discussed above. This university [college] believes that these guidelines apply to the library reserve shelf to the extent it functions as an extension of classroom readings or reflects an individual student's right to photocopy for his personal scholastic use under the doctrine of fair use. In general, librarians may photocopy materials for reserve room use for the convenience of students both in preparing class assignments and in pursuing informal educational activities which higher education requires, such as advanced independent study and research.

If the request calls for only *one* copy to be placed on reserve, the library may photocopy an entire article, or an entire chapter from a book, or an entire poem. Requests for *multiple* copies on reserve should meet the following guidelines:

1. the amount of material should be reasonable in relation to the total amount of material assigned for one term of a course taking into account the nature of the course, its subject matter and level, (17 U.S.C. §107(1) and (3));

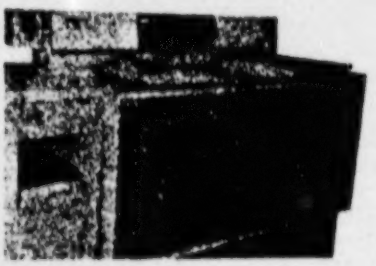
2. the number of copies should be reasonable in light of the number of students enrolled, the difficulty and timing of assignments, and the number of other courses which may assign the same material, (17 U.S.C. §107(1) and (3));

3. the material should contain a notice of copyright, (17 U.S.C. §401);

4. the effect of photocopying the material should not be detrimental to the market for the work. (In general, the library should own at least one copy of the work.) (17 U.S.C. §107 (4).)

For example, a professor may place on reserve as a supplement to the course textbook a reasonable number of copies of articles from academic journals or chapters from trade books. A reasonable number of copies will in most instances be less than six, but factors such as the length or difficulty of the assignment, the number of enrolled students and the length of time allowed for completion of the assignment may permit more in unusual circumstances.

In addition, a faculty member may also request that multiple copies of photocopied, copyrighted material be placed on the reserve shelf if there is insufficient time to obtain permission from the copyright owner. For example, a professor may place on reserve several photocopies of an entire article from a recent issue of *Time* magazine or *The New York Times* in lieu of distributing a copy to each member of the class. If you are in



doubt as to whether a particular instance of photocopying is fair use in the reserve reading room, you should seek the publisher's permission. Most publishers will be cooperative and will waive any fee for such a use.

D. Uses of Photocopied Material Requiring Permission.

1. *repetitive copying:* The classroom or reserve use of photocopied materials in multiple courses or successive years will normally require advance permission from the owner of the copyright, (17 U.S.C. §107(3)).

2. *copying for profit:* Faculty should not charge students more than the actual cost of photocopying the material, (17 U.S.C. §107(1)).

3. *consumable works:* The duplication of works that are consumed in the classroom, such as standardized tests, exercises, and workbooks, normally requires permission from the copyright owner, (17 U.S.C. §107(4)).

4. *creation of anthologies as basic text material for a course:* Creation of a collective work or anthology by photocopying a number of copyrighted articles and excerpts to be purchased and used together as the basic text for a course will in most instances require the permission of the copyright owners. Such photocopying is more likely to be considered as a substitute for purchase of a book and thus less likely to be deemed fair use, (17 U.S.C. §107(4)).

E. How to Obtain Permission. When a use of photocopied material requires that you request permission, you should communicate complete and accurate information to the copyright owner. The American Association of Publishers suggests that the following information be included in a permission request letter in order to expedite the process:

1. Title, author and/or editor, and edition of materials to be duplicated.

2. Exact material to be used, giving amount, page numbers, chapters, and, if possible, a photocopy of the material.

3. Number of copies to be made.

4. Use to be made of duplicated materials.

5. Form of distribution (classroom, newsletter, etc.).

6. Whether or not the material is to be sold.

7. Type of reprint (ditto, photography, offset, typeset).

The request should be sent, together with a self-addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be readily obtained in a publication entitled *The Literary Marketplace*, published by the R. R. Bowker Company and available in all libraries.

The process of granting permission requires time for the publisher to check the status of the copyright and to evaluate the nature of the request. It is advisable, therefore, to allow enough lead time to obtain permission before the materials are needed. In some instances, the publisher may assess a fee for the permission. It is not inappropriate to pass this fee on to the students who receive copies of the photocopied material.

The Copyright Clearance Center also has the right to grant permission and collect fees for photocopying rights for certain publications. Libraries may copy from any journal which

is registered with the CCC and report the copying beyond fair use to CCC and pay the set fee. A list of publications for which the CCC handles fees and permissions is available from the CCC, 310 Madison Avenue, New York, N.Y. 10017.

F. Infringement. Courts and legal scholars alike have commented that the fair use provisions in the Copyright Act are among the most vague and difficult that can be found anywhere in the law. In amending the Copyright Act in 1976, Congress anticipated the problem this would pose for users of copyrighted materials who wished to stay under the umbrella of protection offered by fair use. For this reason, the Copyright Act contains specific provisions which grant additional rights to libraries and insulate employees of a nonprofit educational institution, library, or archives from statutory damages for infringement where the infringer believed or had reasonable ground to believe the photocopying was a fair use of the material. (17 U.S.C. §504(c) (2).)

Normally, an infringer is liable to the copyright owner for the actual losses sustained because of the photocopying and any additional profits of the infringer. (17 U.S.C. §504(a) (1) and (b).) Where the monetary losses are nominal, the copyright owner usually will claim statutory damages instead of the actual losses. (17 U.S.C. §504(a) (2) and (c).) The statutory damages may reach as high as $10,000 (or up to $50,000 if the infringement is willful). In addition to suing for money damages, a copyright owner can usually prevent future infringement through a court injunction. (17 U.S.C. §502.)

The Copyright Act specifically exempts from statutory damages any employee of a nonprofit educational institution, library, or archives, who "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107." (17 U.S.C. §504 (c) (2).) While the fair use provisions are admittedly ambiguous, any employee who attempts to stay within the guidelines contained in this report should have an adequate good faith defense in the case of an innocently committed infringement.

If the criteria contained in this report are followed, it is our view that no copyright infringement will occur and that there will be no adverse effect on the market for copyrighted works.

(Many educational institutions will provide their employees legal counsel without charge if an infringement suit is brought against the employee for photocopying performed in the course of employment. If so, this should be noted here.) ♦

Sample Letter To Copyright Owner (Publisher) Requesting Permission To Copy:

March 1, 1982

Material Permissions Department
Hypothetical Book Company
500 East Avenue
Chicago, Illinois 60601

Dear Sir or Madam:

I would like permission to copy the following for continued use in my classes in future semesters:

Title: *Learning is Good*, Second Edition

Copyright: Hypothetical Book Co., 1965, 1971

Author: Frank Jones

Material to be duplicated: Chapters 10, 11, and 14 (photocopy enclosed).

Number of copies: 500

Distribution: The material will be distributed to students in my classes and they will pay only the cost of the photocopying.

Type of reprint: Photocopy

Use: The chapter will be used as supplementary teaching materials.

I have enclosed a self-addressed envelope for your convenience in replying to this request.

Sincerely,

Faculty Member

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business officer

Newsmagazine of the National Association of College and University Business Officers

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